b. Comments

242. BellSouth, PTG, and SWBT support prohibiting amendments to complaints because such a bar will encourage compliance with the proposed pre-filing requirements and result in a fully developed complaint that conforms to format and content requirements.[667] Several commenters, however, oppose the prohibition. ACTA, GTE, ICG, MCI, and TRA suggest allowing complaints to be amended for good cause, *e.g.* if the complainant could not have reasonably ascertained certain facts at the time of filing of the complaint.[668] MCI expresses concern that such a prohibition might reward monopoly carriers who withhold information.[669] CBT and PTG suggest that any amended complaint be treated as a new complaint to restart the statutory resolution deadline.[670]

c. Discussion

243. The Act requires expedited resolution of certain complaints. An amendment to a complaint subject to a statutory deadline on a showing of good cause would require the resolution of that claim in a shorter period than provided for in the statutory deadline. We believe that the cost of expediting complaint resolutions more than Congress anticipated would outweigh any benefit to be had from allowing such amendments. Further, we are not persuaded by the arguments of ACTA, GTE, ICG, TRA, and MCI that prohibiting amendments to complaints will unduly prejudice complainants to the benefit of defendants. We also decline to adopt the suggestion of CBT and PTG that, instead of prohibiting amendments to complaints, we treat amended complaints as new complaints and restart any statutory deadline on the date of the "new complaint." We are not persuaded that our "treatment" of an amended complaint as a new complaint would comply with the statutory deadline requirements. We note that a complainant is not prohibited from filing a separate formal complaint if it discovers a new claim at some later point in the complaint process. In addition, where appropriate, the staff may consolidate two or more complaints to adjudicate all claims arising out of the same transaction or occurrence in one proceeding.[671] Thus, we adopt a rule generally prohibiting all amendments to complaints.[672] We note that this prohibition on amendments in no way relieves the parties of their obligation under section 1.720(g) of the Commission's rules to maintain the accuracy and completeness of all information and supporting authority furnished to the Commission in a pending proceeding.[673] In addition, we note that complainants always have the option of filing their complaints in federal court if they conclude that the Commission's rules will not afford them the pleading opportunities they need. The Commission's rules have long

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667 BellSouth Comments at 19; PTG Comments at 30; SWBT Comments at 12.

668 ACTA Comments at 8; GTE Comments at 15; ICG Comments at 22; TRA Comments at 25.

669 MCI Comments at 23; MCI Reply at 10.

670 CBT Comments at 15.; PTG Comments at 30

671 *See supra* "Cross-Complaints and Counterclaims" section.

672 *See* Appendix A, § 1.727(h).

673 47 C.F.R. § 1.720(g). These rules draw a clear distinction between adding new counts or arguments to a complaint through an amendment and updating previously furnished information to ensure its completeness and accuracy.

included a fact pleading requirement designed to ensure that a party has sufficient knowledge of its claims before filing its complaint.[674]

5. Additional Suggestions From Commenters

a. The *Notice*

244. In the *Notice*, we sought alternative proposals to modify the rules regarding motions.[675]

b. Comments

245. BellSouth suggests that any request for an interlocutory ruling be deemed a voluntary waiver of any applicable statutory deadline shorter than five months.[676] BellSouth reasons that, given the Commission's limited resources, such a rule is the only way to discourage the filing of time-consuming motions that will preclude Commission staff from meeting the statutory deadlines.

246. AT&T and ICG suggest requiring parties to give advance notice of motions to be filed.[677]

247. PTG suggests that the Commission make a commitment to decide all motions within thirty days of filing, rather than waiting until the final order is issued.[678]

c. Discussion

248. We decline to adopt BellSouth's suggestion that a request for an interlocutory ruling be deemed a waiver of the applicability of any statutory deadline shorter than five months. As discussed in the "Damages" section,[679] the parties to a formal complaint proceeding do not have the authority to waive statutory deadlines, with the exception of the Section 271(d)(6)(B) ninety-day deadline.[680] Even if the parties did have such authority, a rule that allowed a party to waive a statutory deadline by filing any type of interlocutory motion would provide a means for such party to manipulate the deadline and, thereby, eviscerate the intent of the Act to provide expedited resolution for certain complaints.

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[674] *See, Amendment of Rules governing Procedures to be Followed Where Formal Complaints are Filed Against Common Carriers*, Report and Order, 3 FCC Rcd. 1806 (1988).

[675] *Notice* at 20858.

[676] BellSouth Reply Comments at 2, 4.

[677] AT&T Comments at 14; ICG Comments at 22.

[678] PTG Comments at 28-29.

[679] *See supra* "Damages" section.

[680] Section 271(d)(6)(B) states that "[u]nless the parties otherwise agree, the Commission shall act on such complaint within 90 days." 47 U.S.C. § 271(d)(6)(B).

249. We decline to adopt a rule requiring parties to provide notice of their intent to file a motion because we find that such a requirement would not further the timely resolution of motions. We do require parties to certify in any motions to compel discovery that good faith efforts to resolve the discovery dispute were undertaken prior to the filing of the motion.[681] That rule will provide early notice of a party's intent to file such a motion. Other types of motions do not slow down formal complaint proceedings significantly because, unlike discovery disputes, they generally do not need to be resolved to enable parties to support their claims in briefs. Furthermore, the delivery of all motions will be expedited by our requirement that parties serve all motions by hand delivery, overnight delivery, or facsimile transmission followed by mail delivery.

250. We decline to adopt a rule requiring the Commission to rule on all motions within thirty days. The intent of this rulemaking is to speed up resolution of formal complaints and, to the extent the early disposition of a pending motion would further such intent, the Commission will rule on motions as expeditiously as possible. We do not, however, see the benefit of constraining Commission staff by imposing a requirement that all motions be resolved within thirty days.

N. Confidential or Proprietary Information and Materials

251. In 1993, the Commission revised its rules to require a party asserting the confidentiality of any materials subject to a discovery request to mark clearly the relevant portions as being proprietary information. If the proprietary designation is challenged, that party bears the burden of demonstrating, by a preponderance of the evidence, that the material falls under the standards for nondisclosure enunciated in the Freedom of Information Act ("FOIA").[682]

1. The *Notice*

252. Because the format and content proposals may require parties to exchange information and materials with their initial pleadings, the Commission proposed to allow parties to designate as confidential or proprietary any materials generated in the course of a formal complaint, and not limit such designation to materials produced in response to discovery requests.[683] We sought comment on this proposal as well as on whether additional procedures were needed in light of the shortened complaint resolution deadlines in the Act and our proposals in the *Notice* to eliminate certain pleading and discovery opportunities.[684]

2. Comments

253. All of the parties who commented agree that the proposal will encourage parties to exchange information without fear of public dissemination.[685] While it supports the Commission's goals,

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[681] *See* Appendix A, § 1.727(b).

[682] *See* 47 C.F.R. § 1.731.

[683] *Notice* at 20858.

[684] *Notice* at 20858.

[685] *See, e.g.*, BellSouth Comments at 20; CompTel Comments at 11.

ACTA notes that the potential for abuse exists because parties may excessively and unnecessarily label documents and information as confidential or proprietary.[686] MCI requests that the Commission clarify that information considered confidential due to its proprietary, sensitive or competitive nature cannot be withheld from production on that ground.[687]

3. Discussion

254. We conclude that parties shall be allowed to designate as confidential or proprietary any materials generated in the course of a formal complaint proceeding.[688] The commenters support imposing this requirement. We find that, because all parties may have information that is both relevant to a dispute and competitively sensitive, parties must be assured of protection for their confidential or proprietary information if we want to avoid the time consuming process of resolving disputes over the treatment of documents and information sought to be exchanged, regardless of whether the information is produced in response to discovery requests or not. We disagree with ACTA's contention that this requirement might be more subject to abuse than the prior requirement limiting confidential or proprietary designations to materials produced in response to discovery requests. We emphasize that designating information or materials as confidential or proprietary will not prevent the information or materials from being produced, therefore, parties will have little to gain by falsely claiming that materials are confidential or proprietary. Furthermore, if a proprietary designation is challenged, the party claiming confidentiality will continue to bear the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the FOIA's standards for nondisclosure.

255. The modification of the rule providing for designation of material disclosed in the course of a formal complaint proceedings is merely an extension of the previous rule, which allowed for the designation of materials that were disclosed in response to discovery as confidential and proprietary. In current practice, parties that reference facts in or attach materials to briefs that have been designated as confidential or proprietary serve two copies on opposing parties, a public copy that has had confidential materials redacted and is clearly marked "Public Copy" and a confidential copy that contains the material that was redacted from the public copy and is clearly marked "Confidential Copy." In addition, the filing party files the public copy with the Office of the Secretary and files the confidential copy directly with the Commission staff attorney that is handling the matter. This practice will not change. In addition, where a complainant references facts in or attaches materials to its complaint that have been designated as confidential or proprietary, the procedure is substantially the same. A confidential copy of the complaint must be filed under seal directly with the Branch Chief on which it is required to serve two copies of the complaint.[689]

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[686] ACTA Comments at 9.

[687] MCI Comments at 23-24.

[688] *See* Appendix A, § 1.731(a).

[689] *See infra*, "Service, Personal Service of Formal Complaints on Defendants" Section.

O. Other Required Submissions

1. Joint Statement of Stipulated Facts

a. The *Notice*

256. The *Notice* proposed to require parties to submit a joint statement of stipulated facts and key legal issues five days after the answer is filed.[690] We noted that the "rocket docket" rules in the United States District Court for the Eastern District of Virginia require parties to submit written stipulations of all uncontested facts prior to trial.[691] We stated our belief that requiring the parties to submit a joint statement of stipulated facts and key legal issues at this stage might promote agreement on a significant number of the disputed facts and legal issues, as well as help the Commission to determine whether or to what extent discovery is necessary.[692]

b. Comments

257. Most parties support this proposal.[693] Many commenters, however, suggest that the joint statement be submitted later in the process to give parties more time to meet and negotiate.[694] U S West additionally suggests requiring a joint statement of facts in dispute.[695] Bechtel & Cole suggest requiring a joint statement that includes an outline of factual claims and legal arguments,[696] and BellSouth suggests permitting parties to file unilateral statements if the parties cannot reach agreement in time.[697] PTG opposes requiring a filing of a joint statement of facts because it believes that parties would never stipulate to facts.[698] CompTel also opposes the proposal, arguing that nothing will be gained because parties will maintain the same positions taken in their fact-based complaints or answers.[699]

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690 *Notice* at 20858-59.

691 Rule 13 of the Rules of the Eastern District of Virginia requires that, prior to the pre-trial conference, counsel meet to exchange witness and exhibit lists and to create written stipulations of all uncontested facts to be submitted at the pre-trial conference. E.D. Va. R. 13.

692 *Notice* at 20858-59.

693 *See, e.g.*, AT&T Comments at 19; GTE Comments at 16; TRA Comments at 25.

694 *See, e.g.*, AT&T Comments at 19; CBT Reply at 7; Cable Entities Reply at 9; Nextlink Comments at 7.

695 U S West Comments at 12.

696 Bechtel & Cole Comments at 4.

697 BellSouth Comments at 20.

698 PTG Comments at 30.

699 CompTel Comments at 11.

c. Discussion

258. We conclude that parties shall be required to submit a joint statement of stipulated facts and key legal issues.[700] We find that the drafting of such a statement, including the discussions between the parties that are necessary to the drafting of such a document, will promote settlement among the parties or, at the very least, narrow the factual and legal issues the Commission will need to resolve. The joint statement will further assist the Commission in discerning exactly what the parties believe to be the most important issues. We disagree with PTG's argument that the proposal should be rejected because parties will be unable to stipulate to any facts. We find it highly improbable that parties will be unable to stipulate to any facts whatsoever. We further conclude, after consideration of U S West's proposal, that parties shall be required to file a joint statement of disputed facts because such a document will pinpoint the exact facts in dispute. Thus, even where parties are unable to agree on a single fact, that can be made clear to the staff through the joint statement because it will include disputed facts. A clear and unequivocal identification of the issues on which the parties cannot agree will be especially beneficial to Commission staff when it is resolving the need for requested discovery at an initial status conference.[701] We also disagree with CompTel's argument that parties will simply maintain the same positions taken in their complaints and answers. We find that compelling parties to meet after submission of the complaint, answer, and any necessary reply will encourage parties to negotiate their positions, resulting in agreement on some issues and, at a minimum, clarification of the areas in which they disagree. Indeed, we have occasionally required parties to submit stipulations of fact in past complaints, and have found that the parties often are able to reduce significantly the legal and factual issues in dispute.

259. Because several commenters expressed concerns about the timing of the joint statement of stipulated facts, disputed facts and key legal issues, we have extended the time for the filing of the statement. Such joint statement shall be submitted to the Commission by no later than two business days prior to the initial status conference.[702] We conclude that it would provide less of a benefit to the complaint proceeding if we extended the filing date of the joint statement any further. We have timed the filing of the joint statement to coincide with our requirements for interrogatory requests and the "meet and confer" conference that must take place prior to the initial status conference.[703] We find that it is important to require the parties to discuss the factual and legal issues at this particular stage. Parties will have just reviewed the opposing parties' initial pleadings, documentation, and interrogatories but will not yet have participated in the more formal initial status conference. Compelling parties to disclose their positions on all issues in an informal manner, prior to the initial status conference, may be more productive in terms of settling or narrowing the issues than if the same discussion took place after the initial status conference. The parties may feel obliged to take firm positions on the issues in dispute after the initial status conference has occurred. Furthermore, we emphasize that the staff has discretion to grant additional time to submit the joint statement where necessary or appropriate.

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[700] *See* Appendix A, § 1.732(h).

[701] *See supra* "Discovery, Permissible Requests for Discovery" and "Status Conferences, The Initial Status Conference" sections.

[702] *See* Appendix A, § 1.732(h).

[703] *See* Appendix A, §§ 1.729; 1.733(b).

260. We reject BellSouth's suggestion to allow the filing of unilateral statements. The joint statement is beneficial in large part because it is a single document and does not require the Commission to compare two documents to determine on which facts, each articulated slightly differently in the separate documents, the parties agree and disagree. The other significant benefit arises from requiring the parties to meet and discuss all relevant facts and fully articulate their disagreements. Neither of these benefits would be obtained by allowing the parties to file unilateral documents, which would most likely be highly repetitive of the facts laid out in the complaint, answer and any necessary reply. Although Bechtel & Cole suggests that the joint statement include an outline of factual claims and legal arguments, we conclude that the requirement we adopt here effectively encompasses this suggestion.

2. Briefs

a. The *Notice*

261. The *Notice* sought comment on changes to our current briefing process. First, we sought comment on prohibiting the filing of briefs in cases in which discovery is not conducted and requiring parties to include proposed findings of fact, conclusions of law and legal analysis with their complaints and answers.[704] We sought comment on whether parties could reasonably prepare proposed findings of fact, conclusions of law and legal analysis before reviewing the responses to their pleadings and statements of stipulated facts.[705] Second, we sought comment on continuing to allow parties to file briefs, but permitting the Commission staff to limit the scope of such briefs.[706] This option would add some delay to the process but would enable the parties to review both sides of the case before briefing their legal arguments to the Commission.

262. We also sought comment on whether the staff should be permitted to set the timetable for completion of any briefs to give the staff maximum flexibility and control in order to meet the various statutory resolution deadlines.[707] We also asked parties to identify reasonable timetables for completion of such briefs.[708] The *Notice* proposed to limit initial briefs to twenty-five pages and reply briefs to ten pages in all cases.[709]

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[704] *Notice* at 20859.

[705] *Notice* at 20859.

[706] *Notice* at 20859.

[707] *Notice* at 20859.

[708] *Notice* at 20859.

[709] *Notice* at 20860. The current rule permits parties to file initial briefs of up to fifty pages in length and reply briefs of up to thirty pages in length. 47 C.F.R. § 1.732.

b. Comments

263. Bell Atlantic and NYNEX support the proposal to prohibit briefs in cases in which discovery is not conducted.[710] Bell Atlantic argues that under the pre-filing procedures, parties will have sufficient notice of the nature and basis of the complaint to argue the legal issues fully in the complaint and answer.[711] NYNEX states that, if the Commission adopts its proposals to require the complainant to include all of the legal and factual support in the initial filing, subsequent briefs would be superfluous.[712] Both Bell Atlantic and NYNEX agree that, while briefs will probably be unnecessary in most cases in which discovery is not conducted, parties should be able to ask, at the initial status conference, for permission to file briefs on certain narrowly-tailored issues.[713] Most of the commenters feel that parties must be allowed to file briefs because parties may lack the requisite information to file findings of fact and conclusions of law in their complaints and answers. For example, GST, MCI, PTG, Sprint, and U S West argue that parties cannot be expected to submit findings of fact, conclusions of law, and legal analysis prior to reviewing their opponents' pleadings.[714] AT&T argues that briefs are necessary to complete the record.[715]

264. AT&T, Bell Atlantic, GST, KMC, MFS, GTE, MCI, and SWBT support the proposal to allow the staff to limit the scope of briefs.[716] GTE states that permitting parties to file briefs but limiting the subjects of those briefs will expedite the complaint process while allowing each party to establish a complete record.[717] MCI argues that the initial status conference will enable the Commission to tailor the briefing process to fit the needs of each individual case.[718] ACTA, ICG, and PTG, however, oppose permitting staff to limit the scope of briefs, arguing that parties must be permitted to argue their cases as they see fit and on the issues they deem relevant.[719] CBT supports allowing the staff to limit the scope

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[710] Bell Atlantic Comments at 4; NYNEX Comments at 16.

[711] Bell Atlantic Comments at 4.

[712] NYNEX Comments at 16.

[713] Bell Atlantic Comments at 4; NYNEX Comments at 16-17.

[714] GST Comments at 23; MCI Comments at 24; PTG Comments at 31-32; Sprint Comments at 9; U S West Comments at 12.

[715] AT&T Reply at 9-10.

[716] AT&T Comments at 18; Bell Atlantic Comments at 4; GST Comments at 23; KMC Comments at 23; MFS Comments at 22-23; GTE Comments at 16; MCI Comments at 25; SWBT Comments at 13.

[717] GTE Comments at 16.

[718] MCI Comments at 25.

[719] ACTA Comments at 9; ICG Comments at 24; and PTG Comments at 33.

of briefs to disputed issues only, but argues that imposing any further limitations might prejudge the outcome of the case.[720]

265. The commenters support the proposal to reduce the time in which briefs must be filed. Several parties suggested specific timetables,[721] while others were comfortable with allowing the Commission to set the timetable at the initial status conference.[722]

266. Most commenters support the proposal to reduce brief page limits to twenty-five pages for initial briefs and ten pages for reply briefs.[723] Several commenters, such as AT&T and PTG, request that the staff be able to set flexible page limits or that the parties be permitted to file for leave to file longer briefs.[724] ACTA, ICG, and the cable entities argue that a twenty-five page limit is insufficient.[725]

c. Discussion

267. The format and content rules adopted in this proceeding require that complaints, answers, and any necessary replies contain complete legal analysis, full documentary support, and proposed findings of fact, conclusions of law at the time of filing.[726] It has been our experience that parties have used the briefing opportunity to file documents that merely restate the arguments already contained in the complaint, answer, and reply in cases in which discovery is not conducted. In those cases where discovery is conducted and new material facts are introduced into the case as a result of such discovery, briefs are necessary to provide the parties the opportunity to revise or further support their existing analysis in light of the new information disclosed. Eliminating briefs where discovery is not conducted, however, will avoid wasting the Commission's resources reviewing documents that are of little utility, as well as provide parties with incentive to submit complete and fully documented complaints, answers, and replies initially. Thus, we conclude that parties shall be generally prohibited from filing briefs in cases in which no discovery is conducted.[727] The commenters who oppose this proposal are concerned that parties might lack the information necessary to file findings of fact and conclusions of law in their complaints and answers, or that briefs are needed to complete the record. As noted by Bell Atlantic and NYNEX, however, under

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[720] CBT Comments at 16.

[721] For example, AT&T suggested that initial briefs be filed within eighty-five days after a complaint is filed, and reply briefs should be filed within twenty days of initial briefs. In the case of Section 271 complaints, initial briefs should be filed within forty-five days after the complaint is filed and reply briefs should be filed within ten days of initial briefs. AT&T Comments at 17-18.

[722] *See e.g.*, BellSouth Comments at 20; CompTel Comments at 11; MCI Comments at 25.

[723] *See e.g.*, AT&T Comments at 18; GTE Comments at 16; TRA Comments at 25.

[724] AT&T Comments at 18; PTG Comments at 34.

[725] ACTA Comments at 9; ICG Comments at 24; the Cable Entities Reply at 10.

[726] See Appendix A, §§ 1.721(a)(6); 1.724(c); 1.726(c). *See also infra*, "Format and Content Requirements; Support and Documentation of Pleadings" Section.

[727] *See* Appendix A, § 1.732(c).

the new pre-filing activities and format and content requirements, complainants and defendants alike should have sufficient information with which to prepare and file proposed findings of fact and conclusions of law in their complaints, answers, and necessary replies. We emphasize that this rule is not a complete prohibition on the filing briefs in cases in which discovery is not conducted. The Commission may request briefs where briefing would be helpful or is necessary.[728] Further, where a party believes that briefing is essential to fully present its case, it may request such briefing and explain to the Commission why briefing is necessary in that particular case.[729] We note that parties may still file briefs as a matter of right in cases in which discovery is conducted.[730]

268. In those cases in which briefs are permitted, each party is required to attach all documents upon which it intends to rely to its briefs.[731] Parties are permitted to attach to their briefs documents that were previously identified, and affidavits of persons previously identified, in their information designations, along with a full explanation in the brief of the material's relevance to the issues and matters in dispute.[732] Such materials need not have been attached to the complaint, answer, or necessary reply.[733]

269. In those cases in which briefs are permitted, such briefs are required to include all legal and factual claims and defenses previously set forth in the complaint, answer or any other prior pleading submitted in the proceeding that the parties wish the Commission to consider in rendering its decision.[734] Claims and defenses previously made but not reflected in the briefs shall be deemed abandoned.[735] Where, however, the staff limits the scope of the briefs in a manner that does not permit parties to include claims previously raised, the failure to include claims previously raised will not be deemed to be an abandonment of such claims.[736] Although the *Notice* did not specifically propose to require briefs to include all claims previously set forth in the proceeding, we find that this requirement will maximize the utility of briefs. Authorized briefs are a means to facilitate the staff's ability to identify readily all legal and factual claims and defenses made by the parties, along with full citations to the law and the evidentiary record. This requirement should minimize the need for the staff to sift through multiple pleadings submitted by the parties in an effort to identify and address each of their respective claims. In addition, this requirement will prevent staff from having to rule on claims of questionable merit that were identified in initial pleadings, but that the parties do not intend to support or rely on in their briefs.

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728 *See* Appendix A, § 1.732(a).

729 *See* Appendix A, § 1.732(a).

730 *See* Appendix A, § 1.732(d).

731 *See* Appendix A, § 1.732(b).

732 *See* Appendix A, § 1.732(b).

733 *See* Appendix A, § 1.732(b).

734 *See* Appendix A, § 1.732(b).

735 *See* Appendix A, § 1.732(b).

736 *See infra* this Discussion.

270. The Commission may limit the scope of any authorized briefs where appropriate, and set timetables for the filing of such briefs.[737] Most of the commenters support these requirements, because they understand that the Commission needs such limitations and flexibility to accomplish its goal of meeting the statutory deadlines provided for in the Act and expediting the processing of all formal complaints. ACTA, CBT, ICG, and PTG argue that the staff should not limit the scope of briefs because parties should be permitted to brief the issues that the parties themselves deem relevant. These commenters ignore, however, that parties are given the opportunity to file proposed findings of fact and conclusions of law and a complete legal analysis on the issues they deem relevant with their complaint, answer and any necessary reply. To the extent that discovery discloses new material facts, briefs are allowed as a matter of right. The parties also have several opportunities to explain to the staff why particular issues should be briefed. The staff's decision regarding the scope and timing of briefs will be based on the content of the parties' initial pleadings and their joint statement, as well as on information garnered from discussions with the parties at the initial status conference and any other status conferences held. Through these vehicles, parties have an opportunity to identify issues they feel should be briefed and to explain any special circumstances that may warrant a shorter or longer filing time for briefs. Limiting the scope of briefs, when appropriate, will help avoid unnecessary or redundant pleadings that do not facilitate the decision-making process. The Commission's discretion to set timetables on a case-by-case basis for the completion of briefs will help to tailor schedules to the needs of individual complaints.

271. The page limits for allowed briefs shall be twenty-five pages for initial briefs and ten pages for reply briefs.[738] The statutory deadlines imposed by the Act place great burdens on the Commission to evaluate briefs and prepare recommended decisions within short timeframes. We find that reducing the page limits for initial briefs and reply briefs to twenty-five and ten pages, respectively, should yield more focused and concise legal and factual arguments, as well as discourage the filing of briefs containing unnecessary and redundant information. We adopt the suggestion of several commenters to permit parties to request leave to file longer briefs. This provision should alleviate the concern of certain commenters that the page limits may be insufficient in some cases. Parties shall be granted waivers of these page limits for good cause shown.

3. Commenters' Additional Suggestions

a. The *Notice*

272. The *Notice* asked commenters to identify alternative procedures that would facilitate the preparation and submission of clear and concise briefs within the time constraints imposed by the Act.[739]

b. Comments

273. AT&T, ICG, MCI, SWBT, and U S West suggest that the briefing process should mirror that used in federal district court, in which the complainant files a single initial brief, followed by the

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[737] *See* Appendix A, § 1.732(b)

[738] *See* Appendix A, § 1.732(e).

[739] *Notice* at 20860.

defendant's opposition brief, followed by the complainant's reply brief.[740] They argue that simultaneous briefing forces a defendant to reply to a position not yet articulated, and does not give a complainant an opportunity to reply to a defendant's reply brief, while sequential briefing permits parties to meet each other's arguments directly.[741]

c. Discussion

274. We decline to adopt the suggestions of AT&T, ICG, MCI, SWBT, and U S West to require a sequential briefing process. Sequential briefing consists of three stages: the complainant's initial brief, the defendant's opposition brief, and the complainant's reply brief. Each party must be provided with sufficient time to respond to the brief filed in the preceding stage. We conclude that simultaneous briefing, which can be accomplished in two stages (initial brief and reply brief) is more appropriate in light of the time constraints imposed by the Act. While sequential briefing is appropriate in a notice-pleading context, in which the parties may lack information regarding the positions of opposing parties, the benefits to be gained by sequential briefing under the Commission's fact-pleading rules are minimal. Under the requirements imposed in this proceeding, parties must submit fact-pleadings and a joint statement of disputed and undisputed facts and key legal issues, as well as attend an early status conference, where the scope of the briefing will be discussed and may be limited. We find that these requirements will ensure that parties are fully aware of their opponents' positions on all key factual and legal issues by the briefing stage. Simultaneous briefing should not result in parties being prejudiced in any way.

P. Sanctions

275. The *Notice* proposed rules that will place greater burdens on complainants and defendants to be more diligent when presenting or defending against allegations of misconduct in violation of the Act or the Commission's rules. Such diligence must be enforced in order to meet the complaint resolution deadlines contained in the Act and attain the goal of generally improving the formal complaint process.

1. The *Notice*

276. In the *Notice*, we outlined the need for sanctions which would provide sufficient incentives to ensure compliance with the new rules.[742] We asked interested parties to provide us with their proposals for appropriate sanctions.[743] We provided several examples of specific sanctions for certain anticipated rules violations, including: (1) summary dismissal of a complaint for a complainant's failure to satisfy format and content requirements; (2) summary ruling or other judgment in favor of the complainant for a defendant's failure to respond fully and with specificity to a complainant's allegations; and (3) the imposition of monetary fines under the Act's forfeiture provisions for failure to file pleadings in

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[740] AT&T Reply at 10; ICG Comments at 25; MCI Comments at 26; SWBT Reply at 6; U S West Comments at 13.

[741] U S West Comments at 13.

[742] *Notice* at 20860-61.

[743] *Notice* at 20860-61.

accordance with our rules.[744] We asked parties to comment on these and other alternatives that might help to ensure full compliance with the expedited complaint procedures proposed in the *Notice*.[745]

2. Comments

277. Most of the parties who commented generally support the proposed sanctions. Most state that failure to satisfy the form and content requirements should result in summary dismissal of the complaint without prejudice.[746] GST, GTE, KMC, MFS and SWBT argue that, in most cases, the imposition of monetary forfeitures would be preferable to summary grant or dismissal, which they contend should be used only for: (1) failure by complainants to set forth allegations with specificity; (2) failure by defendants to respond to the complaint; or (3) failure by either party to certify that they engaged in good faith settlement attempts.[747] CBT, GST, KMC, and MFS suggest issuing a notice of deficiency or show cause order prior to imposing a sanction.[748] MCI suggests that a defendant should be penalized for its failure to cooperate in the pre-filing stages of a complaint proceeding by permitting the complainant to file a complaint without sufficient facts or documentation. MCI also suggests that a complainant should be penalized for its failure to cooperate in the pre-filing stages by permitting general denials where the defendant lacks necessary information.[749] U S West argues that, because parties seldom violate the Commission's rules, the Commission should make quick and decisive rulings in discovery conflicts rather than emphasize sanctions.[750] Communications Venture Services, Inc. ("CVS") and SWBT suggest imposing sanctions on attorneys as well as clients.[751] ACTA states that the Commission should draw an adverse inference as to material facts to sanction discovery abuses or failure to comply with discovery rulings.[752]

3. Discussion

278. We conclude that no rule modifications are necessary with regard to sanctions at this time. We have at our disposal a wide range of sanctions to address violations or abuses of our formal complaint rules, including summary grant or dismissal of a complaint (in whole or in part), the drawing of adverse

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744 *Notice* at 20860-61.

745 *Notice* at 20860-61.

746 *See e.g.*, Bechtel and Cole Comments at 2; CBT Comments at 17; MFS Comments at 24.

747 GST Comments at 24; GTE Comments at 16; KMC Comments at 24; MFS Comments at 24; SWBT Comments at 14.

748 CBT Comments at 17; GST Comments at 13; KMC Comments at 13; MFS Comments at 13.

749 MCI Comments at 7-8.

750 U S West Comments at 17.

751 CVS Comments at 3; SWBT Comments at 14.

752 ACTA Comments at 6.

inferences as to material facts, monetary forfeitures, admonishment rulings, and show cause proceedings.[753] Because sanctionable behavior may entail a wide range of conduct by complainants and defendant carriers, the Commission has considerable discretion to tailor sanctions to the individual circumstances of a particular violation. Sanctions for a failure to meet pleading requirements should be directed at the nature of the failure. For example, a complainant that fails to properly support a statement of material fact may have such statement treated as an unproven assertion. Sanctions for discovery abuses should provide sufficient incentives for parties to view full and early disclosure as preferable to any potential benefits from dilatory tactics.

Q. Other Matters

279. The *Notice* sought comment on the meaning of the term "act on" in Section 271(d)(6)(B) of the Act pertaining to complaints concerning failures by BOCs to meet conditions required for approval to provide in-region interLATA services.[754] In addition, the Commission stated in the *Sections 260, 274, 275 First Report and Order* and the *Sections 260, 274, 275 Second Report and Order* that certain issues concerning possible evidentiary standards for complaints alleging violations of Sections 260, 274, and 275 would be addressed in the Formal Complaints rulemaking proceeding.[755]

1. Section 271

a. The *Notice*

280. Section 271(d)(6)(B) of the Act provides that the Commission shall "act on" complaints alleging certain violations of the section within ninety days of the date filed, unless otherwise agreed to by the parties.[756] This is in contrast to other complaint provisions added by the 1996 Act which mandate "final" action by the Commission within prescribed time periods.[757] We tentatively concluded in the *Notice* that "act on" as used in Section 271(d)(6)(B) may be satisfied, where appropriate, by a determination of the Common Carrier Bureau whether a BOC has ceased to meet the conditions required for approval to provide in-region interLATA services,[758] and need not require final action by the full

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[753] *See e.g.*, Sections 4(i), 503(b), and 312(b) of the Act, 47 U.S.C. §§ 154(i), 503(b), 312(b).

[754] *Notice* at 20861.

[755] *See Sections 260, 274, 275 First Report and Order* at para. 3; *Sections 260, 274, 275 Second Report and Order* at para. 2.

[756] 47 U.S.C. § 271(d)(6)(B).

[757] For example, Section 260 requires that a "final determination" regarding complaints involving material financial harm to providers of telemessaging services be made within 120 days of filing and Section 275 requires that a "final determination" regarding complaints involving material financial harm to providers of alarm monitoring services be made within 120 days of filing.

[758] *See* 47 U.S.C. § 271 (d)(6)(B); *BOC In-Region NPRM*, para. 97.

Commission.[759] We sought comment on this tentative conclusion and on the appropriate procedure or mechanism for early notice to the Commission of the parties' agreement to extend or waive the ninety-day resolution deadline.[760]

b. Comments

281. Commenters disagree on the meaning of "act on" in Section 271(d)(6)(B). BellSouth, CompTel, GST, KMC, MFS, and MCI state that a Common Carrier Bureau decision constitutes "acting on" within the meaning of Section 271(d)(6)(B) because the abbreviated deadline for resolution is a statutory mandate for prompt relief, which would not be fulfilled by waiting for a decision by the entire Commission.[761] In addition, MCI argues that a Common Carrier Bureau decision is sufficient because the right to decide cases under Section 271(d)(6)(B) is not specifically reserved to the Commission under Section 0.291 of the Commission's rules.[762] CVS, NYNEX, ICG, PTG, and SWBT, however, argue that Section 271(d)(6)(B) requires a Commission decision because it would be contrary to Congressional intent to deny parties the immediate right of judicial review.[763] PTG argues that the Commission must decide Section 271(d)(6)(B) cases because, under Section 0.291, the Commission has not delegated its authority to designate for hearing any formal complaints which present "novel questions of fact, law or policy[,]" nor to "impose, reduce, or cancel forfeitures pursuant to Section 203 or Section 503(b) . . . in amounts of more than $80,000."[764]

282. Regarding the notification of waiver of the Section 271(d)(6)(B) ninety-day deadline, BellSouth suggests that the complainant be required to indicate its willingness to waive the ninety-day resolution deadline in the formal complaint intake form proposed by the Commission to aid in the preparation and filing of formal complaints.[765] GST, KMC, and MFS suggest that such agreement take place during "meet and confer" conferences, which would occur prior to the initial status conferences pursuant to other proposals in the *Notice*.[766]

c. Discussion

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[759] *Notice* at 20861.

[760] *Notice* at 20861-62.

[761] BellSouth Comments at 21; CompTel Comments at 12; GST Comments at 24; KMC Comments at 24; MFS Comments at 24; MCI Reply at 3.

[762] MCI Reply at 3.

[763] CVS Comments at 3; NYNEX Comments at 17-18; ICG Comments at 26; PTG Comments at 35; SWBT Comments at 14-15.

[764] PTG Comments at 35.

[765] BellSouth Comments at 21.

[766] GST Comments at 25; KMC Comments at 25; MFS Comments at 24.

283. Notwithstanding our tentative conclusion in the *Notice* that a decision by the Common Carrier Bureau on the merits of the complaint satisfies the "act on" requirement in Section 271(d)(6)(B), we conclude that we need not address this issue in this Report and Order. We recognize the importance that Congress assigned to the resolution of complaints alleging violations of the competitive checklist requirements as reflected in the ninety-day "act on" requirement. We fully intend to act promptly on all matters pertaining to those requirements to assure that full effect is given to the competitive goals underlying Section 271 of the Act.

284. To facilitate our handling of Section 271(d)(6)(B) complaints, we adopt a rule requiring parties to indicate whether they are willing to waive the ninety-day deadline in their initial filings to the Commission or, at the very latest, by the date of the initial status conference. Parties will have the opportunity to reach an agreement about waiver of the Section 271(d)(6)(B) ninety-day deadline during the pre-filing activities. A complainant should indicate whether or not it is willing to waive the ninety-day deadline in the formal complaint intake form accompanying the complaint. The defendant carrier will have opportunity to respond to the complainant's request for waiver either in its answer or at some earlier date. Parties will have an additional opportunity to discuss the waiver of the ninety-day deadline in their "meet and confer" held prior to the initial status conference.[767] Because meeting a resolution deadline of ninety days will require both strong commitment and meticulous preparation at the very start of the complaint process, from the parties and from the Commission, a request by the parties to waive the ninety-day deadline will be not considered after the initial status conference. Permitting parties to waive the ninety-day deadline at any point in the complaint process could result in the wasteful expenditure of time and resources by the staff and the parties. In addition, we note that even if the parties agree to waive the ninety-day deadline in a Section 271(d)(6)B) case, it is our intent to resolve such cases as expeditiously as possible. Thus, parties should not relax their diligence in meeting our format and content requirements to the fullest extent possible as a consequence of having agreed to waive the ninety-day deadline.

2. Sections 260, 274 and 275 of the Act

285. In the *Sections 260, 274, 275 First Report and Order* and the *Sections 260, 274, 275 Second Report and Order,* we deferred to the Formal Complaints rulemaking the issue of what specific acts or omissions might be sufficient to state a *prima facie* claim for relief under Sections 260, 274, and 275.[768] In that same proceeding, we noted that the complainant has the burden of establishing that a carrier has violated the Act or a Commission rule or order and that burden generally does not shift at any time to the defendant carrier.[769] We also deferred to the Formal Complaints rulemaking the issue of whether shifting the burden of proof from the complainant to the defendant in complaints alleging violations of Sections 260, 274, and 275 would advance the pro-competitive goals of the Act.[770]

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[767] *See supra* "Status Conferences" section.

[768] *See Sections 260, 274, 275 First Report and Order* at para. 3; *Sections 260, 274, 275 Second Report and Order* at para. 2.

[769] *See Section 260, 274, 275 NPRM* at para. 79.

[770] *See Sections 260, 274, 275 First Report and Order* at para. 3; *Sections 260, 274, 275 Second Report and Order* at para. 2.

a. *Prima facie* Claim

i. The *Sections 260, 274, 275 NPRM*

286. In the *Sections 260, 274, 275 NPRM*, we asked parties to comment on what *prima facie* showing should be required of a complainant who alleges that an incumbent LEC has violated Sections 260 or 275, or that a BOC has violated Section 274.[771] Commenters were asked to describe what specific acts or omissions would constitute a *prima facie* claim for relief under those sections of the Act.[772]

ii. Comments

287. Commenters did not address in this rulemaking the issue of what acts or omissions might constitute a *prima facie* claim in complaints alleging violation of Sections 260, 274, and 275. In response to the *Sections 260, 274, 275 NPRM*, however, many parties commented on this issue. Several commenters contend that the same standard for a *prima facie* case should apply to all complaints, including complaints alleging violations of Sections 260, 274, or 275; that is, a complainant would establish a *prima facie* case by alleging facts that, if true, would constitute a violation of the Act.[773] Several parties, however, suggest specific standards for stating a *prima facie* claim for relief under Sections 260, 274, and 275. ATSI states that a complainant alleging a violation of Section 260 should be allowed to establish a *prima facie* case by any showing of denied or delayed access, or any showing of cost or quality differentials between the incumbent's own telemessaging operations and those offered by the complainant.[774] ATSI further suggests that the Commission establish certain safeguards to prevent anti-competitive conduct, and declare that facts demonstrating a violation of these safeguards should be sufficient to state a *prima facie* case of unlawfulness.[775] According to ATSI, because Section 260 was not intended to "mimic a legal proceeding" complainants should not have to undertake costly or time-consuming preparatory work prior to filing a complaint.[776]

288. A number of commenters oppose ATSI's proposals. U S West argues that a Section 260 complaint is a legal proceeding in which both the complainant's and defendant's rights should be respected.[777] BellSouth maintains that a *prima facie* case should include specific allegations of fact showing that a defendant carrier has engaged in prohibited discrimination or cross-subsidization.[778] A

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[771] *See Section 260, 274, 275 NPRM* at paras. 79, 82.

[772] *See Section 260, 274, 275 NPRM* at paras. 79, 82.

[773] *See e.g.*, AICC Comments to *Section 260, 274, 275 NPRM* at 28-29; SWBT Comments to *Section 260, 274, 275 NPRM* at 23; USTA Comments to *Section 260, 274, 275 NPRM* at 7.

[774] ATSI Comments to *Section 260, 274, 275 NPRM* at 3.

[775] ATSI Comments to *Section 260, 274, 275 NPRM* at 12-13.

[776] ATSI Comments to *Section 260, 274, 275 NPRM* at 8, 10.

[777] U S West Comments to *Section 260, 274, 275 NPRM* at 18.

[778] BellSouth Reply Comments to *Section 260, 274, 275 NPRM* at 9.

number of other commenters argue that ATSI's proposals, if adopted, would open the floodgates for unsubstantiated complaints against the incumbent LECs and their affiliates.[779]

289. NYNEX states that, in order to establish a *prima facie* case pursuant to Section 274, the complaint would have to contain a description of the complainant and its interest; be sworn and notarized and state with particularity the facts on which the complaint is based, distinguishing between facts based on personal knowledge and facts based on information and belief; provide a verifiable source of statements based on information and belief; be accompanied by supporting documentation; and identify materials the complainant has been unable to obtain after due inquiry which it asserts are in the possession of the BOC or its separate affiliate.[780]

iii. Discussion

290. We decline to adopt a rule prescribing specific acts or omissions that would be *prima facie* unlawful under Sections 260, 274, and 275. Instead, we will review Section 260, 274, or 275 complaints on a case-by-case basis to resolve compliance issues. We believe that, beyond the specific requirements of the Act and the Commission's implementing rules and orders, it would be impracticable to attempt to delineate specific acts or omissions that would constitute violations of Sections 260, 274 and 275. Acts or omissions that might raise the specter of violations under Sections 260, 274 and 275 are likely to vary widely. Moreover, it is possible that a particular act or omission deemed unlawful in one context may be perfectly reasonable in another. Therefore we will continue our existing practice of requiring that, in the context of a Section 208 complaint proceeding, a *prima facie* showing must include allegations of fact, which if true, would establish that a BOC has violated the Act or any implementing rule or order.

b. Shifting the Burden of Proof to Defendant Carriers in Complaints Alleging Violations of Sections 260, 274 and 275 of the Act

i. The *Section 260, 274, 275 NPRM*

291. In the *Sections 260, 274, 275 NPRM*, we noted that in a formal complaint proceeding the complainant generally has the burden of establishing, by a preponderance of the evidence, that a common carrier has violated the Act or a Commission rule or order.[781] Ordinarily, this burden of proof does not, at any time in the proceeding, shift to the defendant carrier.[782] We sought comment in the *Sections 260,*

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[779] USTA Reply to *Section 260, 274, 275 NPRM* at 4; Yellow Pages Publishers Association Comments to *Section 260, 274, 275 NPRM* at 11.

[780] NYNEX Comments to *Section 260, 274, 275 NPRM* at 30.

[781] *See generally Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, CC Docket No. 92-26, Report and Order, 8 FCC Rcd 2614 (1993); 47 C.F.R. §§ 1.721-1.735.

[782] In the case of complaints alleging violations of Section 202(a) of the Act, however, once a complainant alleging a violation establishes that the services are like and that discrimination exists between them, the burden shifts to the defendant carrier to show that the discrimination is justified and, therefore, not

274, 275 NPRM on whether, for purposes of complaints arising under Sections 260, 274, 275, shifting the ultimate burden of proof from the complainant to the defendant would advance the pro-competitive goals of the Act.[783]

ii. Comments

292. Commenters did not address in this rulemaking the issue of shifting the burden of proof from the complainant to the defendant BOC or incumbent LEC in complaints alleging violations of Sections 260, 274, and 275. A number of parties, however, commented on this issue in response to the *Sections 260, 274, 275 NPRM.* The BOCs oppose shifting the burden of proof to the defendant carrier after a complainant establishes a *prima facie* case, arguing that such a practice would force defendants to prove a negative; *e.g.*, lack of undue delay, unavailability of requested services, or technical impossibility.[784] The BOCs assert that the Administrative Procedures Act ("APA") requires that the burden of persuasion in complaint cases remain on the complainant throughout[785] and that shifting the burden of proof in the manner proposed would encourage the filing of frivolous complaints.[786] SWBT and U S West object to shifting the burden of proof in Section 274 cases, claiming that, because Section 274 has no statutory resolution deadline and complainants have the option of filing their claims in federal district court, burden shifting would promote "forum shopping" by parties wishing to litigate their claims before the Commission under more relaxed standards.[787] In addition, U S West argues that shifting the burden in Section 274 cases would be particularly inappropriate because Section 274 involves First Amendment (private and commercial speech) issues.[788] BellSouth and PTG state that a defendant would bear the burden of producing evidence only if it asserted an affirmative defense, such as the reasonableness of its

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unreasonable within the meaning of section 202(a). *See, e.g., MCI Telecommunications Corp v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990). In any complaint proceeding initiated under Section 208 of the Communications Act, the Commission, and the staff pursuant to delegated authority, may exercise discretion to require a defendant carrier to come forward with relevant information or evidence determined to be in the sole possession or control of the carrier. *See, e.g., General Services Administration v. AT&T*, 2 FCC Rcd 3574, 3576 n.31 (1987). In such cases, however, the burden of persuasion remains with the complainant.

783 *See Section 260, 274, 275 NPRM* at paras. 79, 82. We note that this same issue arose in the *BOC In-Region NPRM. BOC In-Region NPRM* at para. 102. The *BOC In-Region Order* concluded that the burden of production with respect to an issue should shift to the BOC after the complainant has demonstrated a *prima facie* case that a defendant BOC has ceased to meet the conditions for its approval to provide interLATA services under Section 271(d)(3). *See BOC In-Region Order* at para. 345.

784 *See e.g.*, Bell Atlantic Reply to *Section 260, 274, 275 NPRM* at 13-14; NYNEX Reply to *Section 260, 274, 275 NPRM* at 22; US West Reply to *Section 260, 274, 275 NPRM* at 18-19.

785 BellSouth Comments to *Section 260, 274, 275 NPRM* at 27;

786 PTG Comments *Section 260, 274, 275 NPRM* at 27.

787 SWBT Comments to *Section 260, 274, 275 NPRM* at 24; U S West Comments to *Section 260, 274, 275 NPRM* at 22-23.

788 U S West Comments to *Section 260, 274, 275 NPRM* at 22-23 .

actions.[789] Ameritech and PTG concede that, at most, a defendant might be expected to bear the burden of production, but not of persuasion.[790] NYNEX proposes that, rather than shifting the burden of proof to a defendant after a complainant has established a *prima facie* case, a defendant should be required to provide: (1) a sworn and notarized response containing an admission or denial of all allegations in the complaint; (2) a summary of the facts on which the response is based, distinguishing between facts based on personal knowledge and facts based on information and belief; (3) a verifiable source of statements based on information and belief; (4) its defenses; and (5) supporting documentation if available or if it can be reasonably acquired within the time allowed for response.[791]

293. ATSI, AT&T, AICC, MCI, and Voice-Tel all support shifting the burden of proof to defendants once the complainant has established a *prima facie* case. These commenters maintain that burden shifting is appropriate in Section 260, 274 and 275 cases because of short resolution deadlines and the fact that the relevant information will generally be in the possession or control of the defendant BOC or incumbent LEC.[792] AICC states that the BOCs' argument that the APA prohibits shifting the burden of proof to a defendant is inapplicable to Section 275, because the applicable section of the APA, Section 556, only pertains to certain hearings and rulemakings required by Sections 553 and 554, respectively, of the APA.[793] AICC adds that the Commission should follow its tentative conclusion in the *BOC In-Region NPRM* and not adopt a presumption of reasonableness favoring an incumbent LEC or its alarm monitoring affiliate when reviewing complaints alleging violations of Section 275.[794]

ii. Discussion

294. We decline to adopt a rule that would shift the burden of proof to defendant BOCs or incumbent LECs in expedited complaint proceedings pursuant to Sections 260, 274 and 275 of the Act. We do not agree with the arguments of many commenters that shifting the burden of proof in such cases is necessary to advance the pro-competitive goals of the 1996 Act. Nor do we agree that a rule is required to formally shift the burden of production to a defendant carrier after a complainant has demonstrated a *prima facie* case of a violation of Section 260, 274, or 275. The rules adopted in this proceeding, particularly those pertaining to pre-filing activities and the form and content of pleadings, are designed specifically to require both complainants and defendants to exercise diligence in presenting and defending against alleged violations of Sections 260, 274 and 275, as well as other sections of the Act. The new rules require full identification of relevant documents and information in the possession, or within the

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[789] BellSouth Comments to *Section 260, 274, 275 NPRM* at 28.

[790] Ameritech Comments to *Section 260, 274, 275 NPRM* at 33-34; PTG Comments to *Section 260, 274, 275 NPRM* at 26.

[791] NYNEX Comments to *Section 260, 274, 275 NPRM* at 31.

[792] ATSI Comments to *Section 260, 274, 275 NPRM* at 10; AT&T Comments to *Section 260, 274, 275 NPRM* at 24; AICC Comments to *Section 260, 274, 275 NPRM* at 9-11; MCI Comments to *Section 260, 274, 275 NPRM* at 8-9; Voice-Tel Comments *Section 260, 274, 275 NPRM* at 14.

[793] AICC Reply to *Section 260, 274, 275 NPRM* at 13.

[794] AICC Comments to *Section 260, 274, 275 NPRM* at 30.

control, of both the complainant and defendant carrier, along with prompt production or exchange of the information the parties intend to rely on in presenting and defending against claims of unlawfulness under provisions of the Act and the Commission's rules and orders.[795]

295. In addition, the staff retains in all cases the discretion to effectively shift the burden of production in particular cases by directing defendant carriers to produce relevant information deemed to be within their exclusive possession or control.[796] We note that this discretion is conferred under Section 208 of the Act which authorizes the Commission to investigate complaints "by such means and in such manner as it shall deem proper."[797] Moreover, even in the absence of such action by the staff, it will be incumbent upon a defendant carrier to respond fully to any *prima facie* showing made by a complainant, with full legal and evidentiary support. A defendant that fails to provide such a response runs the risk of an adverse ruling or an adverse inference on a material fact.

296. We note that our decision not to adopt a rule to formally shift the burden of production to a defendant carrier after a complainant has demonstrated a *prima facie* violation of Section 260, 274, or 275 is in contrast to our decision regarding Section 271(d)(6)(B) complaints in the *BOC In-Region Order*. There, we concluded that the burden of production with respect to an issue will shift to the defendant BOC after a complainant has made a *prima facie* showing that the BOC has ceased to meet the conditions for its approval to provide interLATA services under Section 271(d)(3).[798] The specificity and nature of the competitive checklist requirements that would form the basis of a Section 271(d)(6)(B) complaint justify a rule requiring a defendant BOC to come forward with evidence of continued compliance with Section 271(d)(3). It would be difficult, however, to attempt to anticipate all of the various factual circumstances that could form the basis of Section 260, 274, or 275 complaints. A rule that would automatically shift the burden of production in all cases would be prejudicial or otherwise unreasonably burdensome on defendant carriers. As discussed in the preceding paragraph, the new rules give Commission staff ample authority to effectively shift the burden of production in cases where it is necessary to promote the full and fair resolution of the matters in dispute.

297. Finally, we conclude, as we did in our *BOC In-Region Order*,[799] that we should not employ a presumption of reasonableness in favor of incumbent LECs in complaint actions under Sections 260 and 275, regardless of whether the incumbent LEC is regulated as a dominant or non-dominant carrier. As we pointed out in the *BOC In-Region Order*, the "presumption of lawfulness given to non-dominant carrier rates and practices is employed in the context of complaints alleging violations of Sections 201(b) and 202(a) of the Act, where the complainant must demonstrate that the defendant's rates and practices are '"unjust and unreasonable."'[800] Sections 260 and 275 contain unqualified prohibitions

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[795] *See supra* paras. 72-76, 78; *see also* Appendix A, §§ 1.721, 1.724, 1.726.

[796] *See supra* paras. 106-107; *see also* Appendix A, § 1.729.

[797] 47 U.S.C. § 208(a).

[798] *BOC In-Region Order*, 11 FCC Rcd. at 2190_, para. 345.

[799] *See BOC In-Region Order*, 11 FCC Rcd at 21905.

[800] *See BOC In-Region Order*, 11 FCC Rcd at 21905, at para. 351.

on discrimination by incumbent LECs and do not require considerations of reasonableness as is the case under Sections 201(b) and 202(a).

IV. CONCLUSION

298. In this *Report and Order,* we amend our rules governing the filing of formal complaints to implement certain complaint provisions added or amended by the 1996 Act, as well as to facilitate the full and fair resolution of all complaints filed against common carriers before the Commission. These rules of practice and procedure will promote competition in all telecommunications markets by providing a forum for the prompt resolution of complaints of unreasonable, discriminatory, or otherwise unlawful conduct by telecommunications carriers.

V. PROCEDURAL MATTERS

A. Petitions for Reconsideration and *Ex Parte* Presentations

299. Parties must file any petitions for reconsideration of this *Report and Order* within thirty days from publication in the Federal Register. Parties may file oppositions to the petitions for reconsideration pursuant to Section 1.106(g) of the rules.

300. To file a petition for reconsideration in this proceeding, parties must file an original and ten copies of all petitions and oppositions. Petitions and oppositions should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. If parties want each Commissioner to have a personal copy of their documents, an original plus fourteen copies must be filed. In addition, participants should submit two additional copies directly to the Common Carrier Bureau, Enforcement Division, Room 6008, 2025 M Street, N.W., Washington, D.C. 20554. The petitions and oppositions will be available for public inspection during regular business hours in the Dockets Reference Room (Room 230) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Copies of the petition and any subsequently filed documents in this matter may be obtained from ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800.

301. Petitions for reconsideration must comply with Section 1.429 and all other applicable sections of the Commission's rules.[801] Petitions also must clearly identify the specific portion of this *Report and Order* for which relief is sought. If a portion of a party's arguments does not fall under a particular topic listed in the outline of this *Report and Order*, such arguments should be included in a clearly labelled section at the beginning or end of the filing.

B. Paperwork Reduction Act Analysis

302. The decision herein has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. 104-13, and the Office of Management and Budget ("OMB") has approved some of its requirements in OMB No. 3060-0411. Some of the proposals have been modified or added, however, and

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[801] *See* 47 C.F.R. §§ 1.49, 1.106. We require, however, that a summary be included with all comments, although a summary that does not exceed three pages will not count toward the page limits. The summary may be paginated separately from the rest of the pleading (*e.g.*, as "i, ii"). *id.*

therefore some of the information collection requirements in this item are contingent upon approval by the OMB.

C. Final Regulatory Flexibility Analysis

303. As required by the Regulatory Flexibility Act ("RFA"),[802] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Notice of Proposed Rulemaking.[803] The Commission sought written public comment on the *Notice*, including comment on the IRFA. The comments received were not specific to the IRFA, but are discussed below to the extent they raise concerns or make suggestions relevant to this analysis. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[804]

1. Need for and Objectives of the *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, and the Rules Adopted Herein

304. The Commission is issuing this *Report and Order* to implement certain complaint provisions added or amended by the 1996 Act and to improve generally the speed and effectiveness of our formal complaint process. The 1996 Act added and, in some cases, amended, key complaint provisions that, because of their resolution deadlines, necessitate substantial modification of our current rules and policies for processing formal complaints filed against common carriers pursuant to Section 208 of the Act.[805] Some of the requirements adopted in this *Report and Order* may have a significant impact on a substantial number of small businesses as defined by Section 601(3) of the RFA. Generally, amended rules will require or encourage complainants and defendants to engage in certain pre-filing activities, change service requirements, modify the form of initial pleadings, shorten filing deadlines, eliminate certain pleading opportunities that do not appear useful or necessary, and modify the discovery process.

2. Summary of Significant Issues raised by the Public Comments in Response to the IRFA

305. In the IRFA, the Commission found that the rules we proposed to adopt in this proceeding may have a significant impact on a substantial number of small businesses as defined by Section 601(3)

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802 *See* 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"), Title II of the CWAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

803 *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Notice of Proposed Rulemaking, 11 FCC Rcd 20823 (1996).

804 *See* 5 U.S.C. § 604.

805 *See* 47 U.S.C. §§ 208, 260, 271, 275.

of the RFA. The IRFA solicited comment on alternatives to our proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding. No comments were submitted directly in response to the IRFA. However, as described below in Section 5, we have taken into account the comments submitted generally by small entities.

3. Description and Estimate of the Number of Small Entities to Which the Rules Adopted in the *Report and Order* in CC Docket No. 96-238 Will Apply

306. The RFA generally defines small entity as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdictions."[806] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.[807] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration ("SBA").[808] Moreover, the SBA has defined a small business for Standard Industrial Classification ("SIC") categories 4812 ("Radiotelephone Communications") and 4813 ("Telephone Communications, Except Radiotelephone") to be small entities when they have no more than 1,500 employees.[809] We first discuss the estimated number of potential complainants, which may include entities that are not telephone companies. Next we discuss generally the estimated number of potential defendants, which would be included in the total number of small telephone companies falling within the SBA's definitions of small business concerns and small businesses. Then, we discuss the number of small businesses within the SIC subcategories, and attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

307. Consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of "small entity" and "small business concerns" for the purpose of this FRFA. We do this because the small incumbent LECs subject to these rules are either dominant in their field of operations or are not independently owned and operated,[810] they are excluded from the definition of "small entity" and "small business concerns." Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."[811]

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806 5 U.S.C. § 601(6).

807 *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

808 15 U.S.C. § 632.

809 13 C.F.R. § 121.201.

810 *Local Competition First Report and Order* at paras. 1328-30, 1342.

811 *Id.*

a. Potential Complainants

308. Section 208(a) provides that formal complaints against a common carrier may be filed by "[a]ny person, any body politic or municipal organization."[812] Beyond this definition, the FCC has no control or information regarding the filing frequency of complaints, nor identities of parties that will file complaints. The filing of complaints depends entirely upon the complainant's perception that it possesses a cause of action against a common carrier subject to the Act, as amended, and it is the complainant's decision to file its complaint with the FCC. Therefore we are unable at this time to estimate the number of future complainants that would qualify as small business concerns under SBA's definition.

309. As noted, the RFA includes "small businesses," "small organizations" (non-profits), and "small governmental jurisdictions." Nationwide, there are 4.44 million small business firms, according to SBA reporting data.[813] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[814] Nationwide, there are 275,801 small organizations.[815] Last, "small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."[816] As of 1992, there were 85,006 such jurisdictions in the United States.[817]

b. Potential Defendants

310. *Estimate of Potential Defendants that may be Classified as Small Businesses.* Section 208(a) provides for the filing of formal complaints for "anything done or omitted to be done by any common carrier subject to this Act[.]"[818] The FCC has no control as to the filing frequency of complaints because such filing depends entirely upon the complainant's perception that it possesses a cause of action against a common carrier subject to the Communications Act of 1934, as amended, and it is the complainant's decision to file its complaint with the FCC. This inability to predict the number of future defendants necessitates conducting this FRFA based on the number of potential small business defendants, which is the number of common carriers that qualify as small business concerns under SBA's definition.

311. *Total Number of Telephone Companies Affected.* The decisions and rules adopted herein may have a significant effect on a substantial number of small telephone companies identified by the SBA. The United States Bureau of the Census ("Census Bureau") reports that, at the end of 1992, there were

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812 47 U.S.C. § 208(a).

813 1992 Economic Census, U.S. Bureau of the Census, Table 6, (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

814 5 U.S.C. § 601(4).

815 1992 Economic Census, U.S. Bureau of the Census, Table 6, (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

816 5 U.S.C. § 601(5).

817 US Department of Commerce, Bureau of the Census, "1992 Census of Governments."

818 47 U.S.C. § 208(a).